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Holder: Justice Court Reform In Montana
JUSTICE COURT REFORM IN MONTANA*

Lon T. Holden

INTRODUCTION

An integral part of any state judicial reform that has occurred in recent years has been either the abolition or complete overhaul of justice of the peace court system.¹ Such action has been the result of a continuing barrage of literature which has attacked this court system on all fronts² and left future commentators only to add insult to injury. Formal criticisms of justices and their operations have been raised in Montana as well.³ Numerous attempts at responding to this and other criticism have been made in proposed constitutional amendments and legislation,⁴ but the system has continued to the present in substantially the same form as has existed since statehood.

However, the passage of Montana's new constitution⁵ and its ultimate validation by the Montana supreme court⁶ make change in this particular level of the court system inevitable. It is here provided that:

*Many of the observations in this comment are made as a result of a survey conducted by the author of the justice of the peace court system in Montana, June-August, 1972. This survey was conducted under a grant from the Governor's Crime Control Commission, and focused primarily upon field visits with justices and questionnaires sent to county attorneys. Both the interviews and the questionnaires utilized open-end questions, the initial assumption being that the system was in need of change, and the primary concern being the form this change should take. Personal interviews were conducted with sixty of the 170 justices serving in the state. Most of these interviews took place in the locality served by the justices, with the remainder being held at either training sessions or the annual convention of the Montana Magistrates Association, September 14-16, 1972. Questionnaires were sent to and received from justices in counties that were not visited, so that at least one justice in fifty-one of the fifty-six counties was either interviewed or contacted by questionnaire. Responses to similar questionnaires were received from thirty-eight county attorneys. The opinions expressed in this comment are the author's and not those of the Governor's Crime Control Commission or the Montana Magistrates Association.

¹Within the past twenty-five years, two-thirds of the states have undertaken reorganization of their lower court systems. For detailed information on these individual reorganization, see THE INSTITUTE OF JUDICIAL ADMINISTRATION, *THE JUSTICE OF THE PEACE TODAY* (1965) [hereinafter cited as IJA, *THE JUSTICE OF THE PEACE TODAY*]; THE AMERICAN JUDICATURE SOCIETY, *A SELECTED CHRONOLOGY AND BIBLIOGRAPHY OF COURT ORGANIZATION REFORM*, REPORT No. 12, (1970) [hereinafter cited as AJS, *A SELECTED CHRONOLOGY AND BIBLIOGRAPHY OF COURT ORGANIZATION REFORM*]; BOOZ, ALLEN AND HAMILTON, INC., *APPENDIX TO THE CALIFORNIA LOWER COURT STUDY*, Appendix F (1971). The federal judiciary has had its commissioner system reformed by enactment of the Federal Magistrates Act, 28 U.S.C. §§ 631-9 (Supp. V, 1970).

²Due to the many and varied writings that are critical of the system, mention of even a representative listing would be impractical. A bibliography of interest can be found in IJA, *THE JUSTICE OF THE PEACE TODAY*, *supra* note 1 at 118-31.

³Mason and Crowley, *Montana's Judicial System—A Blueprint for Modernization*, 29 MONT. L. REV. 1 (1967). [hereinafter cited as Mason and Crowley].

⁴S. MUCKELSTON, *THE JUDICIARY, MONTANA CONSTITUTIONAL CONVENTION STUDY*, No. 14, 91 (1971-1972) [hereinafter cited as MUCKELSTON].

⁵For the sake of simplicity, the following textual material will speak of the Montana constitution of 1889 as "old" and of the constitution approved by the vote of the people of this state on June 6, 1972 as "new."

- (1) There shall be elected in each county at least one justice of the peace with qualifications, training, and monthly compensation provided by law. There shall be provided such facilities that they may perform their duties in dignified surroundings.
 (3) The legislature may provide for additional justices of the peace in each county.⁷

This section reaffirms the constitutional status of justice courts as expressed in section 1,⁸ and thus reflects the Constitutional Convention's acceptance of a retained, reformed justice court system and its rejection of any proposal which would have abolished the system altogether. The delegates to the Convention were presented with several reform alternatives in this area,⁹ with the retention of justice courts as constitutional courts being at the shallow end of the reformistic continuum. One proposal in particular would have followed a prevailing trend and adopted a unified court system where the jurisdiction now exercised by justice courts would have been absorbed by the district courts.¹⁰ This would have left the state with only one level of trial courts and thus, along with the supreme court, a two-court system. Under such a plan, the workload currently handled by justices would have been turned over to magistrates, appointed by the district judges,¹¹ and required to have been admitted to the practice of law unless a person with such a qualification was not available.¹²

No attempt will be made here to laud or condemn the proposal ultimately adopted by the Constitutional Convention, but the proposal's acceptance at the exclusion of others does indicate that the basic mold in which lower court reform in this state can take has already been cast. Certain reform alternatives that have been adopted in other states and debated in this state have already been rejected. Thus, any immediate discussion of justice court reorganization in Montana must begin with the basic hypothesis that these courts are to be retained, and improvement will come about by an overhaul rather than an abolition of the system. This hypothesis will remain valid unless and until the judicial article is amended.

This comment will consider some of the more glaring deficiencies that have continued to exist in justice courts in this state, and also raise some of the alternatives that implementation of the justice of the

⁷State of Montana ex rel. Cashmore v. Anderson, Mont., 500 P.2d 921 (1972).

⁸MONT. CONST. art. VII, § 5 (1972).

⁹MONT. CONST. art. VII, § 1 (1972).

¹⁰MUCKELSTON, *supra* note 4 at 86-7.

¹¹THE MONTANA CITIZENS CONFERENCE FOR COURT IMPROVEMENT, A MONTANA PLAN FOR COURT IMPROVEMENT. For a more general discussion of unified court systems and their implementation, see ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, STATE-LOCAL RELATIONS IN THE CRIMINAL JUSTICE SYSTEM, 134-91 (Washington: U.S. Government Printing Office, 1971). [hereinafter cited as ACIR, STATE-LOCAL RELATIONS IN THE CRIMINAL JUSTICE SYSTEM].

¹²THE MONTANA CITIZENS CONFERENCE FOR COURT IMPROVEMENT, A MONTANA PLAN FOR COURT IMPROVEMENT, *supra* note 10 at Section 9.

¹³*Id.* at Section 12.

peace section of the new judiciary article could take. It is recognized at the outset that any such reform must be treated as the proverbial seamless web, and that any tinkering with the system in one area necessitates corresponding action in other areas. Therefore, even though the following discussion is divided into the numerous problems that any reform effort need consider, it must be kept in mind that attempted solutions of these problems must be viewed in context. It is only in this way that successful reform of the justice courts as a true system can be achieved.

NUMBER AND PLACEMENT OF JUSTICES

Under the old constitution and by present statute, there are to be two justices of the peace for each township in Montana.¹³ This requirement is unrealistic even to the casual observer of the justice court system, and its failure is attested to by the fact that there are two justices per township in only the larger counties. The distribution of those justices that do serve bears little if any relationship either to the geographic size of the county or its population.¹⁴ Because of the large numbers of justices, there often are not sufficient county resources to allow each justice to maintain an adequate court operation. Furthermore, it is often the case that where there are two or more justices in an area, one of them will handle the majority of the caseload and the other justice or justices will handle the remainder in some form of a back-up capacity.¹⁵

Such a situation of an overabundance and poor placement of justices has long been recognized as one of the major faults of this court system, and was recently treated as such in a report by the Advisory Commission on Intergovernmental Relations.¹⁶ The drafters of the new Montana constitution implicitly recognized this problem as well by concluding that there shall be at least one justice of the peace in each county, and that the legislature could provide for additional justices in a county if necessary.¹⁷ Such a mandate does not, of course, further the often cited goals of complete trial court consolidation and unification of all court levels in the judicial system, but it does raise numerous possibilities for reorganization of the present justice court structure.

At least one state has faced the facts of the constitutional status of justice courts and their poor condition by simply deemphasizing them, and relying on other lower court systems to handle what had been at

¹³MONT. CONST. art. VIII, § 20 (1889); REVISED CODES OF MONTANA, § 93-401 (1947) [hereinafter cited as R.C.M. 1947]. See also R.C.M. 1947, § 16-2404, where "two justices of the peace" are considered officers of townships.

¹⁴Mason and Crowley, *supra* note 3 at 7; MUCKELSTON, *supra* note 4 at 79.

¹⁵Interviews with justices, June-August, 1972.

¹⁶ACIR, STATE-LOCAL RELATIONS IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 10 at 36.

¹⁷MONT. CONST. art. VII, § 5 (1972).

¹⁸See, KAN. STAT. ANN. § 61-1603 (1964). Civil jurisdiction is given to magistrate and
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one time within justice court jurisdiction.¹⁸ Applying such an alternative in Montana in hopes of removing the justice courts from active operation does not appear either feasible or very wise. There are presently no other lower court systems operating in the state that could absorb the justice court workload.¹⁹ There would therefore have to be another court system created for this purpose. This would only increase the jurisdictional confusion and the qualifications, financial and supervisory problems that already plague the lower court system in Montana. Proliferation of court systems is not a goal of judicial reform, and would create more problems in this state than it would solve.

Assuming for a moment that both reducing the numbers of justices and consolidation of lower courts are desirable, a second alternative would be to consolidate the jurisdictions of justice and police courts into one county court.²⁰ There would thus be only one lower court in a county, situated in the county seat and staffed by one or more justices depending on the county's population. Such an arrangement might not be totally beneficial or politically acceptable in the largest counties because of present satisfaction with the separate operations of their police and justice courts. For this and other reasons, larger counties could if necessary be exempted from any city-county judicial consolidation.

This consolidation would, however, have numerous advantages in the smaller counties. Two separate judicial operations would no longer have to be maintained, and as a result, solutions to the problems facing the lower courts would be more attainable. With the combination of city-county funding, more money would be available to pay one judge an adequate salary, provide him with acceptable facilities in which to hold court, and allow him to receive the training necessary to function in a competent manner. With the caseloads of these two courts joined, it would be possible to utilize more lower court judges on a full-time basis. This would not only allow those judges that do serve a chance to develop a greater expertise in the matters that come before them,

county courts, while " . . . justices of the peace shall have no jurisdiction in any case, civil or criminal, except in civil actions for the recovery of money only where the amount claimed, exclusive of costs, does not exceed the sum of one dollar (\$1)."

¹⁸Even though R.C.M. 1947, § 11-1701 provides for the creation of municipal courts in cities with populations of more than 20,000 persons, no such courts are now in operation. Police courts, established under R.C.M. 1947, § 11-1601, are in most cases no more desirable than justice courts because of comparable personnel and operational problems.

¹⁹Police courts do not have constitutional status under either the 1889 or 1972 constitutions. Their creation by legislative was pursuant to section 24 of the old constitution which stated that "The legislative assembly shall have power to provide for creating police and municipal courts and magistrates for cities and towns as may be deemed necessary from time to time" This or similar language does not appear in the new constitution, although section 1 provides: "The judicial power of the state is vested in . . . such other courts as may be provided by law."

but would also remove the dangers of conflicts of interest that arise when a judge must seek outside employment to make a living.²¹

Even if this consolidation is not feasible at this time, it would still be desirable to reduce the numbers of justices by structuring them in a county court system. This arrangement would seem to reflect the intent of the new constitution's provisions concerning justices, and would still accomplish many of the benefits that would accrue from city-county judicial consolidation. The structure would involve the creation of a justice court in each county seat, and since there may be more than one justice of the peace in each county,²² the court could be staffed by one or more justices. Legislation could require that a county falling within a certain population classification must elect so many justices to serve in the county seat, and that these justices must serve on a full or part-time basis depending on the county's population.²³ Special consideration would have to be given to those counties where the population dictates that there should be only one justice serving in the county seat, but where travel distances or other genuine reasons would call for more than just this one location. The legislature could make individual determinations in the cases of those counties claiming that the county seat is not readily accessible to other parts of the county, and then provide for the election of any additional justices needed. Such a decision-making power could also be delegated to the supreme court,²⁴ or to the counties themselves to decide where placement of the justices should be made.²⁵ Regardless of what means is utilized to determine this placement, great care must be taken in not resurrecting the present problem of too many justices.

A third alternative would be for legislation to allow counties to band together in multi-county justice court districts, and have one or more justices exercise jurisdiction throughout the district. This would allow several rural counties, each of which perhaps cannot adequately support an effective justice court operation, to pool their resources and have one qualified, full-time justice who could travel throughout the area on a circuit rider basis. Pressing criminal matters that came up in

²¹ACIR, STATE-LOCAL RELATIONS IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 10 at 44.

²²MONT. CONST. art. VII, § 5 (1972).

²³Through observation of numerous justice courts in operation, it is roughly estimated by the author that counties with a population of 40,000 persons or more need at least two full-time justices; counties with populations of 15,000-40,000 persons, one full-time justice; counties with populations of 5,000-15,000 persons, one justice on a half-day basis; and counties with populations of fewer than 5,000 persons, one justice sitting only one or more hours a day. These general estimates are of course only that, and do not take into consideration individual county circumstances, possible changes in the jurisdiction of justice courts, or additional clerical aid for justices.

²⁴Research for the decisions by the supreme court could be made by administrative personnel. *Infra* at 141-2.

²⁵For example, if the population of a county called for one full-time justice, the board of county commissioners could be empowered to split this position, and have one justice elected to serve on a part-time basis in the county seat and one part-time in some other area of the county.

his absence could be handled by a justice elected in each county, serving on an as-needed basis, and paid an hourly wage. A question with this arrangement would arise since the new constitution does not include the position of justice of the peace as one that two or more counties can consolidate,²⁶ but if each county retained one justice, no consolidation would seemingly be effected.

Apart from a plan calling for a justice to be elected in each town having a minimal population,²⁷ any alternative that is considered must focus on reducing the current number of justice of the peace positions. No matter how this reduction in numbers is accomplished, the complaint is sure to be heard that some areas of a county will no longer have a justice of the peace readily available. The argument will be made that if a county only has a justice court in the county seat, a citizen living in a rural area will be greatly inconvenienced in taking care of a traffic or fish and game violation. The question also arises of how a law enforcement officer in a rural area is to obtain a warrant or bring an arrested person before a magistrate when a justice is not readily available. These and other problems of accessibility must be given serious thought, but they are not insurmountable.

As discussed above, provision could be made to allow either the legislature or some other body to consider the individual needs of counties and grant necessary exceptions to any limitations on the number of justices that are imposed. Should such a request fail, it might be necessary for a county to put its justice or justices on a circuit rider basis with trips made regularly to other populated areas of the county.²⁸ If police judges are retained, these judges could be utilized in the absence of the justice to accept fines and take care of the other administrative matters that consume so much of a justice's time. The police judge could also be empowered to serve as a committing magistrate.

There are means, therefore, by which a smaller community could get by without its own justice, and consequently allow a reduction in the number of justices. Thus, just because an area will lose a justice that has had one in the past does not mean that either an ordinary citizen or a law enforcement officer need suffer by that loss. It is to be hoped that while their access to a local justice will be decreased, they will have greater access to a competent justice.

²⁶MONT. CONST. art. XI, § 3 (1972).

²⁷Such a plan would be favored by many justices of the peace, and in fact was supported by the majority of justices attending the Justice of the Peace and City Court Judges School, July 24-27, 1972, in Bozeman, Montana.

²⁸A circuit rider arrangement was suggested by several of those justices and county attorneys interviewed, June-August, 1972.

QUALIFICATIONS

The legislature is mandated by the new constitution to establish qualifications for the office of justice of the peace,²⁹ the lack of which has always been one of the primary criticisms of this lower court system. The legislative responsibility is not a new one, however, and has already been exercised.³⁰ The only real qualification in Montana to satisfy in becoming a justice has been and continues to be one's ability to get more votes in an election than his opponent, and while electoral acceptability is important, political and judicial ability are not synonymous. Any court system is only as effective as its personnel, and thus no reform of the justice courts will be successful unless only qualified persons are attracted to and allowed to remain on the bench. To accomplish this goal, qualifications should be imposed on candidates for this office that recognize both the individual characteristics of this state and the desperate need to improve the quality of justice dispensed at that level of our judicial system. Such qualifications can be divided into several categories, each of which can be discussed separately.

CITIZENSHIP

The requirement of United States or state citizenship is made in a limited number of jurisdictions,³¹ and its existence, if not of great consequence, is at least harmless. Under the new Montana constitution, United States citizenship is required of a state supreme court justice or district court judge.³² Requiring similar citizenship of justices of the peace would not work great improvement in the system, but it would be a step towards uniform judicial qualifications.

STATE RESIDENCY

The requirement of residence in a state for a certain time before the election has also been made.³³ Any such qualification can be viewed in much the same light as citizenship, and again, to promote similar treatment of all judges in the state, justices could be required to reside in the state for two years before taking office.³⁴ Considering the local character of the justice of the peace position, a similar requirement could be made as to residency in the county where election is sought. One factor to be kept in mind, however, is that both citizenship and residency requirements have a questionable correlation to a person's knowledge of the law and his overall competency as a judge. There is the argument that a judge with long tenure in an area can better understand the people

²⁹MONT. CONST. art. VII, § 5 (1972).

³⁰Under R.C.M. 1947, § 93-704, the only qualifications presently existing to seek the office of justice of the peace are to be a citizen of the United States and be a resident of the county for one year before election. To retain the office, a justice must reside in the township where he serves.

³¹IJA, *THE JUSTICE OF THE PEACE TODAY*, *supra* note 1 at table following 16.

³²MONT. CONST. art. VII, § 9 (1972).

³³*Supra*, note 31.

³⁴MONT. CONST. art. VII, § 9 (1972).

and their legal problems that come before him,³⁵ but it is this very situation that will allow a lower court judge to let his personal preferences and prejudices prevail over the impartial application of the law to fact.³⁶

MORAL CHARACTER

A justice of the peace should of course be of good moral character, and at least one state has imposed such a requirement.³⁷ Again, such a qualification is not harmful, but it in practice does little to weed out those who are actually morally or otherwise unqualified for the position. The effect of such a requirement will hopefully be achieved by a vigilant judicial standards commission,³⁸ and the requirement would be superfluous.³⁹

AGE

Sure to be a controversial topic is whether it is necessary to impose either a minimum age requirement for running for the office of justice of the peace, or a mandatory retirement age for those who are holding the position. There are no such age limitations set under the old or the new constitutions or by statute in Montana, but it is a qualification that must be considered.

As for a minimum age, there are states requiring candidates to be of a certain age before holding the office.⁴⁰ Many Montana justices, as well as a few county attorneys, agree with such a qualification and would require candidates to be at least twenty-one, or in some cases, twenty-five. It is true that aging does bring to most persons a greater understanding of human nature, but this process does not necessarily bring either the desire or the ability to study the law and decide cases impartially. Thus, imposing such a limitation would seem to be of undeterminable value and is not recommended by knowledgeable commentators. If an upgrading of the system does make the position of justice of the peace more desirable,⁴² the hazards of the ballot box will take their toll of many of the younger, less-known candidates.

Any discussion of a mandatory retirement age for any occupation is sure to give off more heat than light on the subject, but it is a possible qualification that must be debated. The Advisory Commission on

³⁵This argument was made by several of the justices interviewed, June-August, 1972.

³⁶ACIR, STATE-LOCAL RELATIONS IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 10 at 203.

³⁷LA. CONST. art. 7, § 47 (1921).

³⁸MONT. CONST. art. VII, § 11 (1972). For a brief discussion of this Commission, see *infra* at 147-8.

³⁹Should a written listing of ethical standards be felt necessary, a code of ethics for justices in particular could be drafted and observed. *Infra* at 148.

⁴⁰KENT. CONST. § 100 (1891), (twenty-four; TENN. CODE ANN. § 19-104 (1955) (twenty-one).

⁴¹Interviews with justices and questionnaires from county attorneys, June-August, 1972.

⁴²The key to this desirability will be an acceptable salary; see *infra* at 135-7.

Intergovernmental Relations considered both sides of this argument and recommends that "... where lacking, State laws require mandatory retirement of State and local judges upon reaching age seventy."⁴³ At least twenty-three states cope with the problem of aged justices by imposing such a retirement requirement, usually at the age of seventy.⁴⁴

As contended above, age bears no direct relation to a justice's abilities to discharge his responsibilities, and in most cases, mandatory retirement would only cause the loss of qualified manpower. However, it is those justices who simply do not know when to quit that make some sort of control necessary, and it is these few who spoil it for the majority. A mandatory retirement age would mean that a justice who is losing his capabilities will not be able to hold the position solely as a means of supplementing his retirement income as is often the case. It can be argued that no such age should be set by legislation, but rather, the judicial standards commission should handle this problem on an individual basis.⁴⁵ This action would allow older justices who are still competent to remain on the bench, and would be using this commission as it was intended. The opposing argument is that these commissions are often not as effective as they should be, and that any time a subjective judgment is exercised as to a person's capabilities, mistakes are going to be made. Furthermore, a more humane approach when removing an aged justice from office would seem to exist when he knows he must step down at a certain time, and not let him remain in doubt as to his tenure until an arbitrary determination of his judicial abilities is made.⁴⁶

EDUCATION

Nothing is more controversial and at the center of any justice court reform than the subject of educational qualifications. The layman justice of the peace, lacking a legal education of any sort, has been continually exposed as a judicial impostor. His failure to know both the law and how to apply it in a particular case goes to the core of any attacks on this court system and must provide a focal point for any reform efforts. Along with many, if not most other commentators, the Advisory Commission on Governmental Relations concludes that "... a judge can not be competent unless he is licensed to practice law," and recommends that all judges in a state be so licensed.⁴⁷ Such a position reflects the school of thought that considers legal training to be the base upon which sound legal judgments are built, and which contends that the

⁴³ACIR, STATE-LOCAL RELATIONS IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 10 at 43.

⁴⁴*Id.* at 206.

⁴⁵See discussion of the Commission *infra* at 147-8. Data was not compiled on the individual ages of the justices interviewed, but a fair estimate would be that thirty-six of the sixty were of retirement age.

⁴⁶ACIR, STATE-LOCAL RELATIONS IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 10 at 206.

⁴⁷*Id.* at 42-3.

public image of justice courts can only be improved if and when lawyers sit as justices of the peace as they do at all other levels of the court system.⁴⁸

The opposing theory is that the application of common sense to legal questions should be at the heart of the justice court system, and that the acquisition of such an attribute does not depend upon a law degree. This theory is obviously popular with justices out of a sense of self-preservation,⁴⁹ and does have its outside supporters.⁵⁰ The theory is defended by its supporters on the grounds that it is refreshing to have a court level in a judicial system that does not adhere to often senseless procedures and hidebound, hair-splitting precedents.

This "common sense" position is only acceptable, however, when a justice has a satisfactory knowledge of the law, especially of civil and criminal procedure. He then can temper the harshness of the law with equity and common sense in the truest sense of justice. Many justices in Montana simply do not possess this basic legal knowledge, however, and must substitute common sense for the law in reaching many decisions. The issue thus should not be cast in terms of an either-or proposition, but rather one of priorities.

In light of the wording of the new constitution, there is no technical reason why a law degree requirement for all justices could not still be imposed. But even if this were agreed to be desirable, the frequently mentioned practical and political hurdles would have to be cleared. It is no secret that practicing attorneys are rare in the rural areas of the state,⁵¹ and that even if a circuit rider arrangement were practical in these areas, the travel and relatively low salary would hardly attract competent attorneys in great numbers. The political facts of life require that the failure of the Constitutional Convention to adopt the Montana Plan be kept in mind, as well as the feeling, still deep-rooted in many Montana communities, that a justice of the peace should be a local justice administering local justice.⁵²

One reasonable compromise for this disagreement in both theory and practice would be to require a justice to be an attorney, but only

⁴⁸This thinking was implicit in A MONTANA PLAN FOR COURT IMPROVEMENT, *supra* note 10 at Section 12.

⁴⁹Eight of the justices interviewed, June-August, 1972, considered "good common horse sense" to be the only qualification necessary to hold the position.

⁵⁰JUDGE E. GARDNER BROWNLEE, THE MONTANA JUSTICE OF THE PEACE AND POLICE JUDGE. (1970), 103 [hereinafter cited as BROWNLEE].

⁵¹Petroleum county has no attorney residing within its borders, and there are other counties which have a small enough attorney population to seriously question whether one attorney in each county would be willing and able to serve as a justice of the peace. Interviews with justices and questionnaires from county attorneys, June-August, 1972.

⁵²As expressed by a justice in one of the largest counties, all lawyers stick together, even if one of them becomes a judge, and with lawyers in charge of all the courts in the state, the little guy just doesn't have a chance. Interviews with justices, June-August, 1972.

in the larger counties with a population over a certain figure.⁵³ This figure could be set so as to include only those counties that need one or more full-time justices, and would thus counter many of the practical arguments that would certainly be raised. As an alternative to using only population in this determination, the legislature could consider other county characteristics as well, and specify by name those counties where justices must be lawyers.

For those justices not subject to any legal education requirement that might be imposed, it would not be unreasonable to require some other level of educational achievement. For example, a high school diploma or its equivalent might be required.⁵⁴ Any such qualification would admittedly be minimal in this day and age, but at least it could then be assumed that all justices had the ability to read and write at a satisfactory level.

TRAINING

This topic is really a qualification, since if any training is made mandatory, then taking part in such sessions would be a requirement for not only attaining, but retaining office. It is worth considering separately, however, because not only did the drafters of the new constitution set it apart,⁵⁵ but if it is assumed that at least some laymen will remain as justices, it becomes obvious that some form of systematic training in the law must be offered to and required of them.

Criticism of the collective competency of justices of the peace in this state is not surprising nor unwarranted when training that is available to these judges is considered. No effort has ever been made on a regular basis or on a large enough scale to provide these justices with a comprehensive orientation course, and very little has been offered in the way of continuing legal education to keep them informed on changes in the law or new procedures to be followed.⁵⁶ What is surprising is that so much of the scorn that has been directed at the capabilities of these judges has come from members of the legal community. It is these very people who could have developed programs over the years to increase the legal knowledge of justices, and yet their efforts for the most part have stopped at the contribution of criticism, often unconstructive.

As a first step in raising the collective competency of justices, it seems necessary that attendance at an orientation school be made

⁵³*E.g.*, see WASH. REV. CODE ANN. § 3.12.071 (1961), where a justice is required to be an attorney in cities with populations of 5,000 or more.

⁵⁴*See*, COLO. REV. STAT. ANN. § 37.14.3(4) (1963).

⁵⁵MONT. CONST. art. VII, § 5 (1972).

⁵⁶District Judge E. Gardner Brownlee has conducted three-day training seminars in recent years for lower court judges, under the auspices of either the Governor's Crime Control Commission or the Montana Law Enforcement Academy.

mandatory for laymen justices before they can take office.⁵⁷ Such a school should be at least one or two weeks in duration to be of value. It should not attempt to turn out junior lawyers, but rather to simply inform the justices of what their jobs are as judges and how to go about them in a correct and efficient manner. This comment is no place to lay out such a course in detail,⁵⁸ but some related remarks would be pertinent.

Any such school must be preceded by the development of administrative supervision over the justice court system.⁵⁹ There must be someone or some group with proper qualifications that is not only responsible for conducting the school, but also for determining beforehand the general direction that the training should take. Additionally, there must be some means established of knowing whether the justices practice what they learn once they return home.

The decision must be made whether to incorporate a grandfather clause into the legislative language, and thereby exempt justices from this initial training if they have served in the office in recent years. Such a clause would of course recognize the value of experience and make any training requirements more palatable to justices of the peace. However, the value of having all incumbent and newly-elected justices attend one of the schools and learn to handle their tasks uniformly is undeniable. Tenure as a justice does not insure that correct procedures are followed consistently, and justices themselves are the first to admit this.⁶⁰

It must also be considered whether an examination is to be given at the conclusion of the orientation course.⁶¹ The purpose of such a course, as discussed above, should be to give the justice a basic understanding of his role and functions as a judicial officer. The course should thus provide a foundation on which to build with subsequent training. If a justice has neither the will nor the ability to absorb these basic concepts, this should be made known as early as possible and an examination would provide this information. Those Montana justices

⁵⁷This requirement is made in New York (N.Y. UNIFORM JUSTICE COURT ACT § 105 (McKinney 1963)); Mississippi (MISS. CODE ANN. § 1803.2 (1956)); and Iowa (IOWA CODE ANN. § 601.134 (1950)). In Montana, the school could be held after the election in November and before the first week of January. The issuance of a justice's certificate of election could be contingent upon his presentation of a certificate of completion from the school to the county clerk. Those justices appointed to fill an unexpired term could be allowed to serve, contingent upon their attendance at the next available school.

⁵⁸For a discussion of the content and mechanics of such a course, see Ronayne, *Law School Training for Non-Lawyer Judges*, 17 J. LEGAL ED. 197 (1964); Jacowitz, *Education and Training of Justices of the Peace Prior to Assuming Office—A Proposal*, 34 [sic] NEW YORK STATE BAR JOURNAL 61 (1963).

⁵⁹*Infra* at 140-2.

⁶⁰The majority of those justices interviewed, June-August, 1972, would not object to having to attend such an orientation course. Those that did object did so on practical grounds, e.g. they could not take a week or more off from their business. Only one justice claimed that he would not benefit from such schooling.

⁶¹Ronayne, *supra* note 58 at 207.

commenting on such a course expressed fear of such an examination, however. At least one questioned the ability of the state to deny a person, on the basis of a failed examination, an office to which he had been elected.⁶² While discussing examinations, it should be noted that one jurisdiction makes it necessary for laymen lower court judges to pass an examination, but that there is no orientation course or other formalized training available before the examination.⁶³ The candidate is notified of some of the cases and statutes to be aware of,⁶⁴ and then left to his own devices in acquiring the needed information. Such an arrangement would be impractical in Montana, since many rural candidates would not have easy access to the necessary books. It would also seem to be unwise since one goal of justice court reform in this state must be to promote similarity of operation in the system, and orientation schools would be one means of accomplishing this.

Complementing any orientation courses should be annual seminars which would bring the justices up to date on changes in the law, provide an opportunity to study certain areas of the law in greater detail, and allow justices to get some help with particular problems that are bothering them. Again, details for such sessions should be left for a later time,⁶⁵ but an initial question to be answered is whether attendance at one of these sessions each year should be made mandatory. A requirement of this sort seems entirely realistic and indeed necessary to maintain any degree of competency in the system. Opposition to mandatory attendance would be minimal if it were possible to conduct these sessions regionally, at different times of the year, and for no more than three or four days at a time. Justices themselves recognize the advantages of such regular training, and of those interviewed for this study, fifty-seven said the yearly sessions should be mandatory and only five argued that they should be voluntary. Many of these justices have been to one or more of the voluntary training sessions that have been held in the state, and know that the number in attendance has been insufficient.⁶⁶

As a supplement to any training that is provided to justices, it is imperative that a bench book be prepared for use in justice of the peace courts.⁶⁷ A consistent complaint of justices in this state is that

⁶²Interviews with justices, June-August, 1972. Worry over the examinations would recede as they are found to be fair and the failings are few. The constitutional question has been evaded in New York by awarding a certificate of completion to every justice who completes the school, and then requesting those who "fail" the exam to attend the school again. *Supra*, note 61.

⁶³CAL. GOV'T. CODE § 71601 (West 1964).

⁶⁴Announcement of Qualifying Examination for Office of Judge of the Justice Court, enclosed with a letter from Mr. Warren Marsden, Project Director, Administrator of the Courts, San Francisco, California, dated August 24, 1972.

⁶⁵These seminars could be similar to those sponsored by the Montana Law Enforcement Academy in Bozeman, Montana, on two occasions during the summer months of 1972.

⁶⁶*Supra*, note 65. Of the 170 justices in the state, fourteen attended the first session and thirteen attended the second.

⁶⁷For examples of such books, see ARKANSAS LOCAL COURT JUDGE'S MANUAL, and the WASHINGTON STATE MANUAL FOR JUSTICE COURTS.

they do not have any type of a manual which intelligently sets out the statutes they must deal with or the procedures which must be followed.⁶⁸ A book is needed that can be used by these justices as a guide in their daily judicial activities. It should be written and arranged in an easy to understand fashion, should be loose-leaf so as to allow for regular revision, and should be used as a basic teaching tool in both the orientation school and the yearly seminars.

COMPENSATION

The topic of compensation is of course directly related to the issues of numbers of justices and qualifications. Reducing the number of justices gives those who remain a chance to be better compensated, no matter what form that compensation takes. Any additional qualifications that are imposed must be matched by a correlative increase in compensation to attract and retain qualified persons.

Montana's present compensatory schedule for justices is inadequate, even assuming no significant changes are made in the system. By statute, justices in townships of more than 10,000 persons must sit full-time and are to receive a salary dependent upon the population of the township in which they sit.⁶⁹ Justices in townships with a population of less than 10,000 persons are to retain their fees collected as compensation.⁷⁰ Schedules are established which set out the fees to be charged in both civil and criminal actions,⁷¹ and a ceiling of \$750 per annum is put on fee intake from criminal cases.⁷²

The salaries provided for full-time justices are obviously inadequate, even for laymen, but it is the fee basis of compensation which has condemned this entire compensation plan to extinction. Commentators have universally attacked the fee basis, often on substantial constitutional grounds,⁷³ and no additional criticism seems necessary. The fee system has operated in Montana as contemptably as in other jurisdictions.⁷⁴

The mandate in the new Montana constitution to provide all justices with a "monthly compensation"⁷⁵ should bury the fee system once and

⁶⁸Interviews with justices, June-August, 1972. Justices do find a manual cited *supra*, note 50, to be very helpful; but a bench book with more practical information is still necessary.

⁶⁹R.C.M. 1947, § 25-306. The schedule ranges from a salary of \$4,200 per annum for a justice in a township of from 10,000-15,000 persons, to \$5,500 in a township having a population of more than 18,000 persons. Because of the township population limitation, only twenty-two of the justices in this state are presently salaried. Both salaried and non-salaried justices can retain miscellaneous fees collected under R.C.M. 1947, § 25-304.

⁷⁰R.C.M. 1947, § 25-304.

⁷¹R.C.M. 1947, §§ 25-301, 25-303.

⁷²R.C.M. 1947, § 25-303.

⁷³See, among other writings, Note, *The Justice of the Peace: Constitutional Questions*, 69 W. VA. L. REV. 314 (1967); Reynolds, *The Fee System Courts—Denial of Due Process*, 170 OKLA. L. REV. 373 (1964).

⁷⁴MUCKELSTON, *supra* note 4 at 76-8.

⁷⁵MONT. CONST. art. VII, § 5 (1972).

for all. The initial question in implementing this salary requirement, however, involves the identity of the body which will ultimately set the individual salaries. In some jurisdictions, the state has delegated this power to the counties, and allowed the county commissioners to determine the justice salaries in each county.⁷⁶ Such a procedure does take into consideration the reality of barebone county budgets, the individuality of counties, and the argument that a state should not set specific salary schedules that the counties must meet unless the state is willing and able to absorb at least a portion of that salary.⁷⁷ The problem with this approach is the disparity in the quality of justice that will result, depending upon the amount of money a county would allocate for these salaries. Uniformity in the system would be difficult to maintain, and upgrading of the courts to any degree would not be assured. The justices themselves in Montana recognize the faults of allowing the counties too much discretion in setting salaries.⁷⁸ Such an attitude is due in large part to the poor treatment that many justices have received by their county commissioners, and causes the fear that little would change if responsibility for reform would ultimately rest at the local level.⁷⁹

At least one state has placed salary determinations for lower court judges in the hands of the state supreme court.⁸⁰ Such a procedure would of course promote continuous administrative supervision, but considering the present lack of a staff to deal with such matters, the Montana supreme court is ill-prepared to function in such a capacity.⁸¹

Assuming then that the legislature should establish the salary schedule, another preliminary question of great magnitude concerns the source of these funds. Salaries now paid to Montana justices are paid out of county treasuries,⁸² and it is probable that these same treasuries will again be tapped under any salary schedule that is adopted. However, there is a recognized national trend towards either partial or total state absorption of lower court costs, especially of salaries.⁸³ The administration of justice is coming to be recognized as a legitimate expense

⁷⁶See, NEV. REV. STAT. § 4.040 (1967), under which boards of county commissioners have complete authority to fix compensation of justices either by salary, retention of fees, or both.

⁷⁷ACIR, STATE-LOCAL RELATIONS IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 10 at 206-11.

⁷⁸Of the justices interviewed, June-August, 1972, only three who expressed an opinion on this subject said that the boards of county commissioners should set their salaries. Of the remainder, several felt either the commissioners or the legislature could so act, but the vast majority felt the job should belong only to the legislature.

⁷⁹Interviews with justices, June-August, 1972. Complaints by justices about boards of county commissioners are as numerous as they are varied. Many complained of requests for facilities that have been denied, others of office refurnishing jobs that keep being put off, and one alleged that the county commissioners were going to split the town into additional townships to avoid having to pay a justice a salary.

⁸⁰ALASKA STAT. § 22.15 (1962).

⁸¹*Infra* at 140-2.

⁸²R.C.M. 1947, § 25-306.

⁸³ACIR, STATE-LOCAL RELATIONS IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 10 at 206-11.

that should be incurred by the state, and uniform funding for the justice courts is the only guarantee of statewide consistency of operation. Such a salary sharing arrangement has precedent in Montana,⁸⁴ and the legislature could follow a similar procedure.

These preliminary issues aside, there would appear to be numerous legislative alternatives in establishing the required monthly salary schedule.⁸⁵ An attempt could be made to correlate the schedule to a justice's caseload, but until there is continuous supervision of the justice courts and compilation of related data, this seems impossible. Furthermore, such an arrangement would only resurrect the economic competition problems that are inherent in the fee system of compensation.

A second alternative is to set an arbitrary salary figure that would be paid to any full-time justice in the state.⁸⁶ Those justices serving on less than a full-time basis could receive a percentage of that figure, depending upon the amount of time they are to serve each month. A schedule based on such a figure would promote uniformity in the system and should attract qualified persons, assuming the figure set is adequate. It could not, however, consider the peculiar circumstances of each county, budgetary and otherwise.

One of the more practical alternatives would be to accept the fact that the office of justice of the peace is being transformed from a township position, compensated by fee, into one that is salaried and recognizes a county as its boundaries. As such, justices could simply be added to the list of other county officers whose salaries are determined both by the population of a county and its taxable valuation.⁸⁷ Full-time justices could receive a salary in accordance with the schedule, and those serving part-time could receive a percentage of the schedule amount in relation to the number of hours worked each month. This would accord counties their individual identities, and would automatically provide a justice with a larger salary as the population of the county grew and his caseload correspondingly increased.

FACILITIES

Yet another of the major criticisms leveled at justice courts is the lack of adequate quarters in which justices can handle their caseloads. The argument is made, and justifiably so, that the place where a judge holds court bears a direct relationship to the amount of respect that

⁸⁴Under R.C.M. 1947, § 25-601, the salaries of county attorneys are payable monthly, one-half from the county treasury and one-half from the state treasury upon the warrant of the state auditor.

⁸⁵The assumption is made that at least for the near future, the majority of justices will continue to be laymen.

⁸⁶*E.g.*, under 10 DEL. CODE ANN. § 9209 (1953), a justice earns \$10,000 a year.

⁸⁷R.C.M. 1947, § 25-605. Considering the responsibilities held by a justice as a judicial officer, it would seem necessary that they be treated as are county superintendents of schools and county sheriffs under the statute, and thus receive the additional \$400 in excess of what the schedule dictates. The schedule was amended in 1971 to raise all the bases.

both he as a judge and that court level are accorded.⁸⁸ Thus, any upgrading of this court system must involve a reassessment of justice court facilities.

The unlikely places that justices in Montana have held "court" have been documented and do not bear repeating.⁸⁹ This situation can come as no surprise, however, in light of controlling legislation. Neither the state nor the county are required to provide any facilities for justices,⁹⁰ and one statute makes it very clear that "[a] justice's court may be held at any place selected by the justice. . . ."⁹¹ Thus, with no statutory requirement of either funding for facilities or holding court in a particular place, it is difficult to find fault solely with the justices themselves.

This lack of fiscal and administrative direction has led to a situation where only a minority of justices of the peace in this state hold court in a location which has any semblance of a courtroom. Of those justices personally interviewed on field visits, it was found that twenty-one of them handled the majority of their caseloads in an office in the courthouse, nine at their place of business, twenty-one in their homes, three in sheriff's offices, and one in a jail.⁹² In defense of this general situation, it is true that a person is usually more concerned with the outcome of a court proceeding than the physical surroundings,⁹³ and that too much formality can result in the intimidation of persons appearing in court.⁹⁴ Such statements only remain true, however, when time is of the essence in a case and appearance must give way to substance, and also when there already exists enough formality in a court to remind a person that he is involved in a judicial proceeding. Neither of these conditions prevails in Montana justice courts at this time.

The drafters of the new constitution were aware of this problem, and wrote that "[t]here shall be provided such facilities that they may perform their duties in dignified surroundings."⁹⁵ This later phrase is nothing but empty words of art and can only take substance from what legislation make of them. Any treatment of this phrase will, of course, depend upon the degree of justice court consolidation that can be achieved, but several alternatives seem available.

⁸⁸ACIR, STATE-LOCAL RELATIONS IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 10 at 183.

⁸⁹Mason and Crowley, *supra* note 3 at 5.

⁹⁰Under both R.C.M. 1947, § 16-3606 and § 25-306, the board of county commissioners may provide suitable quarters for justices of the peace at county expense.

⁹¹R.C.M. 1947, § 93-402.

⁹²Interviews with justices, June-August, 1972. This figure of only one-third of the justices having a "courtroom" compares favorably to that percentage found in a study conducted in 1966. See, Mason and Crowley, *supra* note 3 at 5.

⁹³BROWNLEE, *supra* note 50 at 101. This is certainly true in criminal proceedings, *e.g.* when an arrested person is brought before a justice to have bail set.

⁹⁴McConnell, *Some Trials of the Magistrate*, 54 A.B.A.J. 37, 38 (1968). As written, ". . . and if it is true that a defendant is more comfortable and therefore more inclined to appear and defend himself when he feels wronged given a less formal atmosphere, perhaps we should hesitate in making the magistrate courts more formal, even if the defendant then perversely complains of the lack of formality."

⁹⁵MONT. CONST. art. VII, § 5 (1972).

Legislation could speak in specific terms as to what must be provided by the counties in the way of an office, such as its size, seating capacity, and specific location. This language would have the advantage of promoting uniformity in the system and the assurance that the need for judicial decorum would be recognized in every county, no matter how rural the setting. Any such specific requirements might, however, prove impossible to follow in counties with genuine facility problems already, and would necessitate continuous revision as needs of the courts changed.

A second alternative would be to simply require the counties by statute to provide their justices of the peace with "dignified surroundings," and then rely on the sound discretion of the boards of county commissioners in assessing the needs of their local justice court and satisfying them. Such a provision is really no change from the effect of present statutes, and it is questionable if the counties would satisfactorily discharge their responsibilities in light of their poor record in the past.⁹⁶

A third alternative would be based on the assumptions that it is desirable to have as much of a justice's caseload as possible handled in a respectable office, and that this office if at all possible should be located in the county courthouse so as to benefit from that building's atmosphere. Counties with populations of over 5,000 persons could be required to provide justices who are sitting in the county seat with an office in the courthouse and access to the district courtroom. This office should be "respectable," or have to meet some other standard, but should not have to conform to impractical size and location requirements. The setting aside of an office for justices in the larger counties does not appear unreasonable in light of the priority that should be accorded justices as judicial officers, and the fact that justices in such counties should be serving on at least a half-day basis. Undoubtedly, some counties would claim unavailability of room in the courthouse for justice quarters, but faith should be placed in their resourcefulness.⁹⁷

In counties with populations of less than 5,000 persons, a justice is probably not needed any more than a few hours a week, and it would seem unrealistic to tie up an office in the courthouse for his exclusive use, even if one were available. Therefore, the justice could be required to hold court in the district courtroom, and if necessary, to share an office with another county officer. If it were found necessary that some justices should serve outside the county seat, the county could be required to make arrangements so that an office, or at least access to an office, is available in a public building such as a city hall.

⁹⁶*Supra* note 79.

⁹⁷Some justices themselves claim a lack of room in the courthouse for an office. Interviews with justices, June-August, 1972. This situation can be deceiving, however. In one county, a justice conducts a private business out of a rented office in the courthouse, and yet claimed there was no room in the courthouse for justice of the peace quarters.

Legislation of this nature must go the next step and require justices to hold court in the facilities that are to be provided. It is not unrealistic to expect some of the "kitchen-table" justices to continue to hold court as they have in the past, even though an office is made available. Also, legislation should not only focus on the rooms to be utilized as quarters, but must consider furniture and fixture needs as well. This observation should not even have to be made, but it becomes necessary when justice offices are either so sparsely furnished so as to resemble interrogation rooms or so poorly furnished as to resemble secondhand stores.

At the same time facilities are discussed, thought must be given to providing some clerical help to justices. Justice of the peace budgets in the largest counties in the state usually include some funds for such aid. However, some of the justices who serve part-time in other counties have increasingly large caseloads and are finding it difficult to have time both to hold court and do all the necessary bookkeeping and docket work.⁹⁸ One solution would be to require a county to provide a justice with clerical help for so many hours a week, depending on county population. Another alternative would be to utilize the clerk of the district court as a clerk for justice courts as well. This office could at least handle the justice court's docket books, and thus increase the chance that the requisite entries are correctly made.⁹⁹ Support for such an arrangement by district court clerks is questionable, however, and some justices would even oppose the plan since it would put their operations under the direct observation of the district court.¹⁰⁰

SUPERVISION

Completing the set of often repeated complaints against justice of the peace court systems generally is the charge that they too infrequently come under the critical gaze of any supervisory authority. These courts are usually not part of a unified judicial system, and with each court operating in its own vacuum, there are few means available of knowing whether an individual justice is doing what is expected of him and doing it correctly. Thus, it appears that if an upgrading of the system is to be lasting in effect, there must not only be some means of successfully implementing these reforms, but also of insuring that their intent is carried out at the local level.¹⁰¹

⁹⁸Interviews with justices, June-August, 1972.

⁹⁹*See*, State of Montana ex rel. Wicks v. District Court of the Tenth Judicial District, ____ Mont. ____, 498 P.2d 1202 (1972). Here, since the docket of a justice of the peace insufficiently reflected the requisite probable cause for the issuance of an arrest warrant, the warrant was held invalid and the subsequent search and seizure was found unlawful.

¹⁰⁰Interviews with justices, June-August, 1972.

¹⁰¹*See*, Giese, *Why Illinois Proposes to Abolish Justice of the Peace Courts*, 50 ILL. B. J. 677, 679 (1962). "... these attempts to revise the justice of the peace system have been woefully inadequate, since justices of the peace and police magistrates still remain as an independent appendage to the judicial system, with no official or body authorized to put the legislative rules into effect or to assume responsibility for the activities of the justices and the coordination of the system."

The old constitution gave "general supervisory control over all inferior courts" to the supreme court,¹⁰² but this control has rarely been exercised in a true administrative fashion.¹⁰³ At the present time the Montana supreme court exercises no supervision of the justice courts, and its clerk receives no data or other information on their operation.¹⁰⁴ Current statutes provide for no better control apart from relatively worthless fiscal checks by way of itemized statements and reports.¹⁰⁵ Supervision by the district courts is limited to those cases that are appealed from justice courts.¹⁰⁶

The new constitution does not speak directly to this problem of supervision, and only restates the old constitution's ambiguous mandate that the supreme court shall have "general supervisory control over all other courts."¹⁰⁷ Legislation will therefore be required to give meaning to these words and to provide this all-important key to successful overhaul of the system. The most pressing need is for some authority to start showing a continuous concern for the operations of these courts, and since the supreme court already has this responsibility in general, it seems logical that it should discharge this responsibility in particular.¹⁰⁸ Legislation could expressly fix administrative supervision over the justice courts in the supreme court, and this body could then exercise this supervision by way of enforced rules of practice and procedure.¹⁰⁹

To aid the supreme court in carrying out this responsibility, the legislature could create and fund the position of a court administrator. Persons holding such a position in other jurisdictions bring a knowledge and experience in administration to the task of aiding in the supervision of court systems, and are usually concerned primarily with the higher court levels in a state.¹¹⁰ A court administrator in this state could concern himself with the supreme and district courts as well, but the weakest link in the Montana judicial system is the lower courts, and it is here that attention should be focused and an administrator's talents put to work.

A court administrator does not control a court system, but only provides a supreme court with the necessary expertise so that it can act intelligently in its supervisory capacity. Once the court so acts, it remains to the administrator to see that the decisions made are imple-

¹⁰²MONT. CONST. art. VIII, § 2 (1889).

¹⁰³MUCKELSTON, *supra* note 4 at 93.

¹⁰⁴Interview with Mr. Tom Kearney, Clerk of the Montana Supreme Court, September 15, 1972.

¹⁰⁵R.C.M. 1947, §§ 25-307, 31-114, 31-116, 94-801-1.

¹⁰⁶R.C.M. 1947, §§ 93-7901, 95-2009.

¹⁰⁷MONT. CONST. art. VII, § 2 (1972).

¹⁰⁸Unless the judiciary itself assumes the responsibility of central administrative control over these courts, the legislature will have to take that responsibility and the treasured independence of the judiciary will be threatened. See, Pringle, *Court Organization and Administration*, 1 LAND AND WATER L. REV. 569, 576-7 (1966).

¹⁰⁹See discussion of the rule-making function, *infra* at 142-5.

¹¹⁰For a discussion of the position, see Comment, *Court Administration: The Newest Profession*, 10 DUQUESNE L. REV. 220 (1971).

mented and then observed. Within such a context, an administrator in this state could direct his and the supreme court's attention to such matters as the standardization of bookkeeping procedures in justice courts, the enforcement of reporting requirements, the drafting of new procedural rules and their observation, the collection of data relevant to these courts, and the concentration of effort to generally improve the quality of justice that results at that level of our court system.

Not only could an administrator in Montana supervise the justices, but he could advise them as well. Justices of the peace presently have no proper person to turn to for information and advice on matters that come before them. As a result, they either suffer in ignorance or develop an unhealthy dependence upon the counsel of their county attorney. Other justices look no further for advice than their local law enforcement officers.¹¹¹ A court administrator could serve as an objective and readily available source of needed information, and could in this way carry on a continuing training program.

Supposing a need for such a position is not recognized or funds are not available, the goal of continuous administrative supervision must still be attained. Assuming the supreme court should still have that responsibility, it would then become necessary for an active judicial council to be formed to provide the court with the needed information.¹¹² Such an organization might be called for by legislation or by rule of the supreme court, should represent both those in and out of the legal community, and could continually survey the justice court system in the state and make their findings and recommendations known to the supreme court. This body as a means of administrative supervision is, of course, inferior to a court administrator who could bring both his expertise in the area and his undivided attention to the task at hand. The national trend is in fact to replace judicial councils with full-time administrators.¹¹³

PRACTICE, PROCEDURE AND JURISDICTION

Once a framework of effective administrative supervision is developed for the justice courts in Montana, thought must then be given to the creation of rules under which these courts will operate. As discussed above, each justice tends to work in a vacuum.¹¹⁴ This situation results not only from an absence of supervision, but also from a lack of legislative or judicial standards that a justice can apply to his own

¹¹¹Interviews with justices, June-August, 1972.

¹¹²See, Finley, *Judicial Administration: What is This Thing Called Legal Reform?* COLUM. L. REV. 569, 589-91 (1965). Organizations such as the Montana Citizens Conference for Court Improvement have been active in this state, but the scope of their operations falls short of providing continuous supervision of justice courts.

¹¹³ACIR, STATE-LOCAL RELATIONS IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 10 at 100.

¹¹⁴*Supra* at 140.

judicial activities. He is faced with few rules that must be observed as to the internal administration of his court, and also finds little guidance in statutes that focus on the procedural steps in litigation. His confusion over court operations in general does great harm to his competency as a judge, and can only be cleared up by the imposition of enforced rules.

The power to make such rules was not delegated under the old constitution. It consequently developed that the supreme court so acted with the permission of the legislature,¹¹⁵ although little attention has been given to justice courts. Neither does the new constitution delegate administrative or procedural rule-making authority to the supreme court or the legislature. It thus remains possible for either the legislature or the supreme court, under a grant of authority from the legislature, to act in this area.

PRACTICE

Justices themselves in this state are quick to complain about the lack of standards that govern them in their day-to-day activities.¹¹⁶ There are statutes that deal with such topics as office hours,¹¹⁷ and which entries must be made in the dockets,¹¹⁸ but each justice of the peace is, for the most part, left to administer his own court at his own discretion. This situation not only frustrates any goal of having the justice courts operate as a uniform court system, but also puts an unnecessary burden on justices to retain their independence as judges. Since administrative rules do not exist, persons such as law enforcement officers often attempt to have a justice court operated for their own purposes and convenience.¹¹⁹

The solution called for is the drafting and implementation of a set of administrative rules for all justice courts by either the legislature, or, preferably, by the supreme court at the direction of the legislature. These rules should spell out in understandable terms what is expected of justices in the internal operations of their courts (e.g., what hours a justice court should be open in a county with a certain population), and make a specific attempt to clear up the many bookkeeping, docketing,

¹¹⁵For a discussion of the rule-making power both generally and in Montana, see MUCKELSTON, *supra* note 4 at 103-9.

¹¹⁶Interviews with justices, June-August, 1972.

¹¹⁷R.C.M. 1947, § 25-306. The 1889 Montana Constitution (art. VIII, § 22) only confused the issue by requiring that "Justices' courts shall always be open for the transaction of business, except on legal holidays and nonjudicial days."

¹¹⁸R.C.M. 1947, §§ 93-7601, 95-2002.

¹¹⁹Interviews with justices, June-August, 1972. Of course, it is admitted that due to a justice's role as a judicial officer, e.g., his part in the criminal commitment process, he must be flexible in terms of when, where and how he holds court. However, when law enforcement personnel start telling a justice how to handle a case since there are no other rules to follow, then the independence of the judiciary at that court level is in jeopardy.

and reporting problems that plague the system. Without such directives and their enforcement, little reform of justice court operations can be achieved.

PROCEDURE

The system not only needs rules for the administration of courts, but also procedural rules to govern the handling of litigation. Present statutes concerning criminal procedure in justice courts are found in the Montana Code of Criminal Procedure, and require no immediate, sweeping changes.¹²⁰ Justice courts are also subject to numerous statutes concerning civil procedure.¹²¹ Several of these individual statutes will have to be reconsidered in light of anticipated reform of these courts, but the most glaring fault to be found with them is not their content so much as their presentation. They follow no consistent pattern, and reflect little of the clarity and common sense that is found in the Montana Rules of Civil Procedure which govern the district courts.¹²² It would be desirable if the rules for justice courts could be adapted to a similar format.

When considering the adoption or change of any procedural rules, it will also be necessary to discuss the need for and the structuring of small claims courts in this state. This court is commonly viewed as a judicial forum where a person can get his day in court without having to endure the expensive and frustrating trappings of a traditional court. It is, ideally, a place where a person can take a small monetary claim that an attorney cannot afford to handle, and have that claim settled by a judge as inexpensively and expeditiously as possible. Procedures to handle such claims differ of course in those states that offer this alternative, but their chief characteristics remain fairly universal.¹²³

It is difficult to document the need for such courts in Montana, but their creation would not be hard to justify in light of the present expense of litigating a small claim and the few such claims that are eventually litigated. In a detailed study of the caseloads of justices of the peace in this state, it was learned that "... the great bulk of such civil actions [in justice courts] are actions for recovery of debt, generally through the medium of garnishment or attachment . . .,"¹²⁴ and it was therefore concluded that "... small civil claims are largely ignored under our present system."¹²⁵

¹²⁰R.C.M. 1947, § 95-2001 *et seq.* The section which sets out docket entry requirements (R.C.M. 1947, § 2002) perhaps needs revision and expansion in light of the case cited *supra* note 99. R.C.M. 1947, § 95-2006 (a) also requires revision since a unanimous verdict of the jury will be necessary in justice courts. See MONT. CONST. art. II, § 26 (1972).

¹²¹R.C.M. 1947, §§ 93-6601, 93-7714, 93-7901 *et seq.*

¹²²Mont. R. Civ. P., Rule 1.

¹²³Mason and Crowley, *supra* note 3 at 24.

¹²⁴*Id.* at 22.

¹²⁵*Id.* at 23. The same conclusion was reached by this author from interviews with justices, June-August, 1972. Many of the part-time justices in the smaller counties had

Assuming that a need does exist in Montana for a small claims court, the question arises as to how the court should be structured. Details of these courts in other jurisdictions vary greatly, and it is impossible to generalize from this multi-state information as to whether a new or existing court level should assume this function. It is significant to note, however, that in at least seven of the states that have retained a justice of the peace court system, this system has been utilized to handle small claims.¹²⁶ Whether this arrangement would be possible in Montana depends certainly upon the success of the reforms of the justice system that are eventually implemented.¹²⁷ If the competency of justices is raised to a point where at least some of them could fairly and intelligently conduct a small claims court, then it would be sensible to use this existing system. Rules for such a court have already been drafted,¹²⁸ and could provide a place at which to begin discussion. Another alternative would be to create a separate court level to handle small claims,¹²⁹ but it is hard to view proliferation of courts in Montana at this time as an acceptable direction of change. This step should only be taken if and when it is concluded that the present judicial system is incapable of meeting this need, even with substantial improvement.

JURISDICTION

Any consideration of procedure requires at least a brief discussion of the present and future jurisdiction of justice of the peace courts. It is also difficult to direct any course of change in the system without knowing what proportion of judicial business this particular court level will handle. Under the old constitution, justices sat in courts of limited jurisdiction,¹³⁰ and references were made to the exact kinds of cases that could not be handled in these courts.¹³¹ Justices were also directed

a hard time remembering the last civil case they had handled which involved only private citizens. Even in one of the largest counties where the justices serve full-time and where the court would seem to be more receptive to small claim-type actions, the clerk of that court estimated that more than ninety-five per cent of the civil cases filed in a year are collection actions.

¹²⁶Nevada, Oregon, South Dakota, Texas, Utah, Vermont and Washington.

¹²⁷It is well-recognized that even the consideration of a small, elementary monetary claim calls for the services of a qualified judge. See, R. POUND, ORGANIZATION OF COURTS, 279 (1940). Initially, it would not be necessary that all justices in the state handle small claims, and perhaps only those demonstrating the requisite ability could so act. It is to be hoped that eventually at least one justice in each county could handle these claims.

¹²⁸Mason and Crowley, *supra* note 3 at 24-5.

¹²⁹The legislature could create this new court system. See MONT. CONST. art. VII, § 1 (1972).

¹³⁰MONT. CONST. art. VIII, § 20 (1889).

¹³¹MONT. CONST. art. VIII, § 21 (1889). Listings of what is within the jurisdiction of justice courts are found in R.C.M. 1947, §§ 93-408, 93-410.

not to handle "... any case where the debt, damage, claim or value of the property involved exceeds the sum of three hundred dollars."¹³²

These courts retain their limited jurisdiction label under the new constitution, and, except for mention that they can only serve as examining courts in a felony, no mention is made of those cases which the court cannot handle.¹³³ This deletion, for the first time, places numerous types of actions in a position where they could fall within the jurisdiction of justice courts, dependent upon forthcoming legislation. These changes should not be immediate, however, and should only be made as the degree of success of any reform efforts is ascertained.

The failure of the new constitution to cite any civil jurisdictional amount limit for justice courts is also significant. Although the \$300 figure still remains by statute,¹³⁴ it now is possible for the legislature to adjust this figure as it deems necessary. This action should be part of any reform package, and should take into account such factors as the inflationary pressures on law suits, similar figures in other jurisdictions, and the fact that there is now overlapping jurisdiction between justice and district courts.¹³⁵

There are jurisdictional problems which the new constitution does not touch upon, including the various powers and duties which have been brought within a justice's jurisdiction over the years. Statutes presently give a justice of the peace a "jack-of-all-trades" function, which includes acting as a coroner on occasion,¹³⁶ serving as a deputy registrar of electors,¹³⁷ and investigating fires.¹³⁸ These statutes are infrequently invoked and admittedly cause no serious harm, but it would be desirable that other county officers assume these duties if necessary, and thereby free the justice from as many non-judicial functions as possible.

DISCIPLINE AND REMOVAL

Even with substantial reform of the system in those areas discussed to this point, the possibility of an occasional unacceptable justice being elected to and retaining office must be recognized. Such improvements as fewer justices, acceptable salaries, stricter qualifications, adequate training, continuous supervision, and the imposition of enforced

¹³²MONT. CONST. art VIII, § 20 (1889). For a more complete treatment of the jurisdiction of justice courts, see Mason and Kimball, *Montana's Justices' Courts—According to the Law*, 23 MONT. L. REV. 62, 67-81 (1961).

¹³³MONT. CONST. art. VII, § 5 (1972).

¹³⁴R.C.M. 1947, § 93-408.

¹³⁵Under R.C.M. 1947, § 93-318, district courts have jurisdiction when the amount in controversy exceeds fifty dollars. Justice courts have concurrent jurisdiction with district courts on forcible entry and unlawful detainer actions under R.C.M. 1947, § 93-9705.

¹³⁶R.C.M. 1947, § 16-3405.

¹³⁷R.C.M. 1947, § 23-505.

¹³⁸R.C.M. 1947, § 82-120-9.

administrative and procedural rules will do much to insure that a more qualified candidate will be elected and will serve, but incompetence and unethical behavior are often slow to surface in any position.¹³⁹ When this happens, there must be effective means available to either discipline the guilty parties, or in some cases, remove them from the system.

To the present time, means have not been available to discipline justices of the peace in Montana. An exasperated county attorney or district judge might on occasion privately rebuke a wayward justice for an extraordinarily large blunder, but no further steps are taken to see that the error is not repeated. As for removal from office, a justice cannot be impeached as can other state and judicial officers.¹⁴⁰ He is, however, subject to removal for misconduct or malfeasance as are all other state officers not liable for impeachment.¹⁴¹ There is also available another procedure called "summary proceedings" under which even a private citizen can initiate action against any public officer.¹⁴²

If utilized when necessary, either of these procedures could be effective in cleansing the justice court system of many of the judges who are responsible for the system's low public esteem. However, due to the character of the procedures, i.e., criminal and quasi-criminal in nature, it is not surprising that county attorneys and other persons are hesitant in bringing such actions. The proceedings are so public and potentially damaging that an airtight case would have to be brought against a justice, who is not entirely to blame for his failings.¹⁴³

The new constitution offers another solution by requiring the creation of a judicial standards commission.¹⁴⁴ Its creation will follow the prevailing trend in the handling of unsatisfactory judges,¹⁴⁵ and should be an acceptable solution to this sensitive problem. The commission's success, however, in improving the collective competency of justices of the peace will only come if this body keeps its *raison d'être* firmly in mind and does not serve a whitewashing function. The supreme

¹³⁹This danger is even increased under the new constitutional provision which raises the term of office for a justice of the peace to four years, up from the two year tenure that has been in effect. See MONT. CONST. art. VII, § 7 (1972).

¹⁴⁰R.C.M. 1947, § 94-5401.

¹⁴¹R.C.M. 1947, § 94-5501. This procedure is commenced by an accusation brought by a grand jury, county attorney, or the attorney general, and the trial required is conducted in the same manner as for a misdemeanor. See R.C.M. 1947, § 94-5502 *et seq.*

¹⁴²R.C.M. 1947, § 94-5516. This proceeding is treated like a civil case, and yet is quasi-criminal in nature.

¹⁴³It would appear difficult to indict a person for his ignorance when those in positions of power have done little to change that condition. This feeling is attested to by the fact that apparently few such proceedings have ever been brought against a justice of the peace in Montana.

¹⁴⁴MONT. CONST. art. VII, § 11 (1972). The commission is to investigate complaints made against any justice or judge in the state, and from its confidential proceedings are to come recommendations to the supreme court. The court is then empowered to take steps, including removal from office, against the offenders.

¹⁴⁵ACIR, STATE-LOCAL RELATIONS IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 10 at 103-4.

court must also act in response to the commission's recommendations in a fair and firm manner. Should this working relationship be achieved, no changes in existing statutes or additional provisions for the discipline or the removal of justices from office seem necessary.

MISCELLANEOUS CONSIDERATIONS

Any overhaul of the justice court system should touch on various topics that have not thus far been discussed for one reason or another. A few of these topics should at least be mentioned. One of these is the desirability of adopting a code of ethics which would apply to justices both in and outside of their judicial activities.¹⁴⁶ Perhaps with increased supervision of the system and the presence of the judicial standards commission, such a code would be superfluous. However, it would still be beneficial in providing justices with a means to remind them of their ethical obligations as judicial officers. The supreme court could promulgate such a code, or the court could merely pass upon a draft submitted by the Montana Magistrates Association.

Another subject to be mentioned is the present requirement of having justices of the peace run for office on a partisan ballot.¹⁴⁷ This is one of the more frequent complaints of justices,¹⁴⁸ and caused the adoption of a resolution at their most recent state meeting calling for the nonpartisan election of candidates to this office.¹⁴⁹ Those justices interviewed who raised this objection were hard-pressed to cite any specific instances where this requirement has in any way infringed upon their judicial integrity,¹⁵⁰ and there is the argument that the nonpartisan election of judges has some inherent shortcomings.¹⁵¹ Nevertheless, treating justices similar to district and supreme court judges for election purposes would give them much-needed identity as judicial officers, and would be a relatively simple change to make in at least partially restoring public confidence in these courts.

Finally, it would be desirable that when reform does come to this system, that an attempt be made to collect these new provisions, the changed statutes, and those that remain the same and bind them into a cohesive justice court act.¹⁵² *The Revised Codes of Montana*, (1947), now has statutes that relate to justices of the peace and their courts scattered throughout its chapters, and the capstone of any reform should be a unification and recodification of these statutes.

¹⁴⁶As an example, see VIRGINIA JUSTICES' OF THE PEACE MANUAL, ix (1967).

¹⁴⁷R.C.M. 1947, § 23-2001 *et seq.* provides for the nonpartisan nomination and election of only justices of the supreme court and judges of the district courts.

¹⁴⁸Interviews with justices, June-August, 1972.

¹⁴⁹Annual convention of the Montana Magistrates Association, Helena, September 14-16, 1972. Such a change was also called for in H.B. 362 submitted to the 1972 session of the Montana state legislature.

¹⁵⁰Interviews with justices, June-August, 1972.

¹⁵¹ACIR, STATE-LOCAL RELATIONS IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 10 at 196-7.

¹⁵²See, e.g., N.Y. UNIFORM JUSTICE COURT ACT, § 101 *et seq.* (McKinney 1963).

CONCLUSION

It is hoped that the preceding remarks raise some of the more immediate problems that must be faced when any attention is given to reform of the justice of the peace courts in Montana. In light of the mandates of the new constitution, the legislature must sooner or later come to grapple with these problems that have been too long ignored. It is further hoped that this comment will at least present some food for thought on alternatives to their solution.

Many of those alternatives considered are admittedly less reformistic in nature than those debated and ultimately adopted in other states that have recently gone through this very same process. However, as discussed previously, the delegates to the Constitutional Convention appreciably narrowed the path that lower court reform can take in this state in the immediate future. Coupling this fact with concerns for practicality and political acceptability, it simply becomes necessary to take smaller steps. Even those steps that are taken are going to seem unnecessary to many persons who have no quarrel with the system, and it is this dichotomy of positions which must be compromised.

It is believed that reforms such as those suggested are both substantial enough to effect a beginning of the requisite upgrading of the system and pragmatic enough to take into consideration the numerous and varying oppositions to change. Such proposals as these or ones similar, which revolve around the retention of the justice court system, deserve a chance to prove themselves. If they should fail, abolition of the system by way of a constitutional amendment must be seriously considered and a true unified court system adopted.